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No. 97-29

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

STATE OF TEXAS, APPELLANT,

v.

UNITED STATES OF AMERICA.

On Appeal From the
United States District Court for the
District of Columbia

BRIEF OF AMICI CURIAE WASHINGTON LEGAL FOUNDATION AND THE HONORABLE ROBERT E. TALTON, MARY DENNY, BOB HUNTER, KENT GRUSENDORF AND EUGENE J. SEAMAN IN SUPPORT OF APPELLANT

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QUESTIONS PRESENTED

Does a three-judge panel of a district court have jurisdiction over a State's claim, under 42 U.S.C. § 1973c, that an amendment to a state statute is not a change covered by § 5 of the Voting Rights Act, and need not be precleared?

Is a State's claim that an amendment to a statute is not subject to the preclearance requirements of § 5 of the Voting Rights Act ripe, when the United States Attorney General has precleared the statute as "enabling" legislation, but the State has not taken action under the "enabling" legislation?

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INTEREST OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters nationwide.[1] WLF seeks to promote the rights of states to

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[1] Pursuant to Supreme Court Rule 37.6, WLF hereby states that no counsel for a party in this case authored this brief in whole or in part, and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission (continued...)

ensure quality education for school children, and to retain the states' traditional authority to govern in matters of education free from excessive federal interference. WLF has devoted substantial resources to protecting the rights of states to challenge excessive federal intervention into matters in which the states retain a paramount interest, by publishing monographs and similar educational materials on these subjects, and by filing *amicus curiae* briefs in appropriate cases. See, e.g., *Lewis v. Casey*, ___ U.S. ___, 116 S.Ct. 47 (1996) (filing *amicus* brief on behalf of Arizona Constitutional Defense Council concerning state's obligation to provide law libraries for prisoners); *ACORN v. Miller*, ___ F.3d ___, 1997 FED App. 0323P, No. 96-1229 (6th Cir. Nov. 3, 1997) (supporting Michigan's opposition to federal "motor voter" law); Stephen F. Smith, *States Defend Constitutional Rights Against EPA* (WLF LEGAL BACKGROUNDER, Feb. 17, 1995); Michael Scott Feeley and Lino J. Lauro, *Commerce Clause Cases Could Limit Federal Environmental Regulatory Power* (WLF LEGAL OPINION LETTER, Jan. 20, 1995); Maureen E. Mahoney and Michael J. Guzman, *With Motor-Voter Bill, Congress May Have Invited a Constitutional Challenge* (WLF LEGAL OPINION LETTER, Mar. 11, 1994). WLF thus brings a broader perspective to the issues in this case than that presented by the parties in this action.

Amici Robert E. Talton, Mary Denny, Bob Hunter, Kent Grusendorf, and Eugene J. Seaman serve as duly-elected members of the House of Representatives for the State of Texas. As such, they have a direct interest in

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[1](...continued)
of this brief.

ensuring that statutes enacted by the Texas Legislature are implemented without excessive interference from the federal government, and in promoting accountability within the Texas educational system.

WLF is filing this brief with the consent of both parties. WLF has lodged consent letters with the Clerk of the Court.

STATEMENT OF THE CASE

This case arises from a declaratory judgment action brought by the Appellant, the State of Texas ("Texas") in federal district court in the District of Columbia. Texas's complaint alleges that the Texas legislature has enacted amendments to its education laws in order to ensure quality education for the children of Texas. The Texas Education Code, as amended, contains an assessment and accountability system which holds school districts accountable for student performance, compliance with state laws, and effective governance procedures. *See generally* TEX. EDUC. CODE §§ 39.131(a),(e). Of particular importance to this appeal, the statute at issue authorizes the Texas Commissioner of Education to appoint a master or management team, on a temporary basis, in order to bring a local school district into compliance with state educational standards. TEX. EDUC. CODE §§ 39.131(a)(7),(8). The statute specifically describes and circumscribes the powers of the master or management team. TEX. EDUC. CODE § 39.131(e). The statute thus authorizes limited and temporary oversight of elected school district trustees in managing a district's compliance with state standards and federal law.

On June 12, 1995, Texas submitted portions of the legislation containing these amendments to the United States Department of Justice ("DoJ") for administrative preclearance under Section 5 of the Voting Rights Act, although Texas took the position that the sanctions provisions did not constitute election-related changes.[2] DoJ agreed that various sanctions provided under §§ 39.131(a)(1)-(6) were not voting changes subject to preclearance, but maintained that the sanctions provided under §§ 39.131(a)(7)-(10) were changes affecting voting and therefore precleared them only as enabling legislation. DoJ stated that Texas would have to obtain preclearance in each instance in which it placed a master or management team to oversee the operations of a school district under §§ 39.131(a)(7) and (8). Pet. App. at 37a-38a.

On June 7, 1996, Texas filed a declaratory judgment action seeking a ruling that the temporary placement of a master or management team under §§ 39.131(a)(7) and (8) are not changes affecting voting, and that it may use its statutory powers to impose these sanctions without first obtaining preclearance under the Voting Rights Act. In the alternative, Texas sought a declaratory judgment that Section 5 of the Voting Rights Act did not apply to actions taken pursuant to the Improving America's Schools Act, 20 U.S.C. §§ 6301, *et seq.*, as modified under the waiver authority of the Education Flexibility Partnership Demonstration Act, 20 U.S.C. § 5891(e) ("Ed-Flex").

The lower court accepted jurisdiction on July 15, 1996, and appointed a three-judge panel. Before the lower court,

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[2] Texas is a jurisdiction subject to § 5 of the Voting Rights Act. *See* 42 U.S.C. § 1973(b)(b); 28 C.F.R. § 51 app. (1995).

DoJ took the position that the sanctions authorized by §§ 39.131(a)(7) and (8) may well require preclearance, but that Texas's claims were not ripe for review because Texas had not yet appointed a master or management team and its use of the appointment power could only be analyzed on a case-specific basis. The lower court agreed, and dismissed Texas's complaint. Pet. App. at 2a. The lower court reasoned that Texas's claim failed both the constitutional and prudential aspects of the ripeness doctrine, and that Texas's claims of hardship from lack of judicial review were "vague". Pet. App. at 5a-9a. Texas appealed to this Court, and this Court noted probable jurisdiction.

SUMMARY OF ARGUMENT

This case presents an important issue concerning the ability of a state to ensure comparable quality education for all of its school children by reforming its education laws without excessive interference from the federal government. Although this Court and the Congress have consistently recognized the paramount state interest in providing education services,[3] the Appellee United States of America ("United States") in this case takes the position that the federal Voting Rights Act, together with constitutional and prudential concerns of ripeness, require the State of Texas

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[3] *See, e.g.*, 20 U.S.C. § 5899(a)(3) ("in our Federal system the responsibility for education is reserved respectively to the states and the local school systems and other instrumentalities of the states"); and § 5899(b) ("Congress agrees and reaffirms that the responsibility for control of education is reserved to the States and local school systems and other instrumentalities of the States . . . ."); *United States v. Lopez*, ___ U.S. ___, 115 S.Ct. 1624, 1633-34 (1995) (Commerce Clause does not authorize federal government to regulate each and every aspect of local schools).

to seek preclearance any time it takes certain actions under its recently enacted education statute.

Neither the federal Voting Rights Act nor the principle of ripeness dictates the result reached by the lower court and advocated by the United States. Under this Court's seminal decision in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), the ripeness of a case for judicial determination is analyzed under a two-part test. First, the Court considers the "fitness of the issue for judicial determination." Second, the Court considers the "hardship to the parties of withholding court consideration." *Id.* at 149.

Both prongs of the *Abbott Laboratories* test are met by Texas's declaratory judgment action. Texas has asked the lower court to rule on a question of law concerning a matter of statutory interpretation, *viz.*, whether it is required by the Voting Rights Act to seek preclearance for the appointment of a master or management team. The hardship to the State of Texas of denying review would be profound; indeed, Texas's education reforms, which are designed to provide a prompt, temporary response to failures in local school districts, would be eviscerated if Texas were required to mire itself in bureaucratic red tape or time-consuming litigation any time it desired to exercise its authority.

Texas is also correct in its contention that the implementation of its education reforms are not subject to preclearance under the Voting Rights Act. This further demonstrates that the issue Texas presented to the lower court was purely legal and should have been addressed. Section 5 of the Voting Rights Act applies only to changes in voting. As this Court found in *Presley v. Etowah County Commission*, 502 U.S. 491 (1992), the Voting Rights Act

does not apply to changes in the administration of state or local governments which may incidentally effect the powers and functions of an elected office.

Texas also argued below that the education reforms at issue were specifically authorized by federal statutes, and thus, for Voting Rights Act purposes, any actions taken pursuant to the statutes were not actions of a state or local government or subdivision. Therefore, Texas argued alternatively that the reforms were not subject to preclearance under the Voting Rights Act on this basis. Again, framed in this manner, Texas's claim clearly presented a pure legal issue of statutory interpretation which could have and should have been resolved by the lower court. The lower court did not need any further factual development or case-specific application in order to evaluate this claim.

ARGUMENT

The issue before the Court is whether a state which has enacted important reforms to ensure quality education for its school children may implement those reforms without excessive interference from the federal government. Traditional principles of federalism and state autonomy in the provision of education services mandate that Texas be permitted to obtain a judicial determination that its reforms do not require preclearance under the Voting Rights Act. Neither the Voting Rights Act nor ripeness concerns dictate a different result.

I. TEXAS'S CLAIMS ARE RIPE FOR JUDICIAL DETERMINATION

The lower court erred in holding that Texas's declaratory judgment action was not ripe for judicial review. Both parties agree that this Court's decision in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967), states the governing law. In *Abbott Laboratories*, this Court held that ripeness is governed by a two-part test; first, the Court must consider the "fitness of the issue for judicial decision", and, second, the Court must consider the "hardship to the parties of withholding court consideration." *Id.* at 149.

The Court explained that "the basic rationale [of the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 148. Because this case presents legal issues concerning the application of the Voting Rights Act to Texas's educational reforms, and because principles of federalism mandate that Texas control its educational system without excessive federal interference, both prongs of *Abbott* are met by Texas's lawsuit.

A. The Issues Presented by Texas's Declaratory Judgment Action are Fit for Judicial Decision

Texas has asked the lower court to resolve a present case or controversy between itself and the United States. Texas's declaratory judgment action asks the lower court to decide a pure question of statutory interpretation. This case

therefore falls squarely within this Court's decision in *Abbott Laboratories*, in which the Court held that the question whether the Food and Drug Commissioner had correctly interpreted a statute was fit for judicial determination because "the issue tendered is purely a legal one." *Id.* at 149.

This Court in *Abbott* required that the issue to be resolved be "sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *Id.* at 152. Like the issue presented in that case, DoJ's decision that Texas's placement of a master or management team must be precleared puts Texas in the dilemma of either complying with the preclearance requirement, and thereby subjecting activities within a traditional sphere of state autonomy to federal supervision, or risking extensive litigation which would defeat the State's ability to govern and ensure quality education.

Notably, the Court in *Abbott Laboratories* cited with approval several prior decisions which confirm that the lower court should have resolved this controversy. In *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942), this Court held reviewable a Federal Communications Commission regulation which set forth proscribed contractual arrangements between chain broadcasters and local stations. Although the FCC had not in fact denied or revoked any licenses, and the FCC regulation could only have been characterized as "a statement . . . of its intentions", *Abbott Laboratories*, 387 U.S. at 150, the Court held that the regulations were subject to challenge. *Columbia Broadcasting System*, 316 U.S. at 418-19.

The Court also approved of two additional decisions which had taken a similarly "flexible" view of finality. In *Frozen Food Express v. United States*, 351 U.S. 40 (1956), the Court held reviewable an Interstate Commerce Commission order listing exempt commodities, but which had not included the petitioner's commodities. Although the order had no authority except to serve notice of how the Commission interpreted the Act and would have effect only if and when an action was brought against a particular carrier, the Court held the order subject to review. *Id.* at 45. Also, in *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 198 (1956), the Court held reviewable an FCC regulation announcing a Commission policy that it would not issue a television license to an applicant, even though no application was before the Commission.

The structure of the Voting Rights Act, and the Act's specific provision of different modes of challenge, does not in any way diminish Texas's right to seek a declaratory judgment.[4] This Court has held that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories*, 387 U.S. at 141 (citing *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962)). Thus, in *Abbott*

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[4] The lower court was hesitant to address Texas's declaratory judgment action because it did "not fall clearly into" any of the three categories for actions previously recognized under Section 5. Pet. App. at 4a. Those three categories, recognized by this Court in *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), provide that: a state may bring an action for judicial preclearance, seeking a declaration that a new rule was not enacted for a discriminatory purpose; an individual may bring a private enforcement action for declaratory judgment and injunctive relief to block a change that has not been precleared; and the Attorney General may bring an enforcement action. *Id.* at 554-57, 561.

Laboratories the Court also rejected the Government's argument that Congress's authorization of specific procedures for review thereby excluded other types of pre-enforcement challenge. *Id.; see also Allen*, 393 U.S. at 554-57 (finding private parties could bring declaratory judgment action for enforcement of Voting Rights Act although Act did not explicitly grant or deny right to sue for state's failure to comply). Thus, the fact that Congress has provided other means to obtain judicial determinations concerning changes which arguably implicate the Voting Rights Act should not have deterred the lower court from addressing Texas's complaint.

The lower court held, and DoJ contends, that Texas's claims are not fit for judicial decision because any decision would have to be based upon hypothetical facts which may not come into being. However, this case could have been resolved by the lower court without waiting for Texas to exercise its authority to place a master or management team.

The authority of Texas to make such a placement, and the limitations upon a master or management team appointed under the statute, are specifically set forth in the statute. TEX. EDUC. CODE § 39.131(e). Under the statute, the elected board of trustees is not displaced while a master or management team is in place. The statute directs the master or management team to address a specific deficiency in the school district which led to the appointment; meanwhile, the school board continues to exercise its authority in other matters.

The statute further requires that the Commissioner of Education evaluate the continued need for the master or management plan every ninety days, and requires removal

of the master or management team unless the "continued appointment is necessary for effective governance of the district or delivery of instructional services." *Id.* Also, the statute limits the powers of the master or management team, by preventing them from taking any action concerning a district election, changing the number or method of selecting the board of trustees, setting a tax rate for the district, or adopting a budget providing for spending a different amount from that previously adopted by the board of trustees. TEX. EDUC. CODE §§ 39.131(e)(3)-(6). Given these limited powers of the master or management team, it is clear that the school district board of trustees will retain authority to perform many essential functions even while an appointment is in place.

It was therefore unnecessary for the lower court to await any factual determinations in order to decide whether the appointment of a master or management team constituted a change affecting voting within the meaning of the Voting Rights Act. The lower court could have, and should have, rendered a declaratory judgment based upon a legal assessment that Sections 39.131(a)(7) and (8) do not create changes affecting voting subject to the Voting Rights Act.

B. The Lower Court Improperly Minimized the Hardship to the State of Texas Caused by Denying Judicial Consideration

In ruling that Texas's claim failed the second prong of *Abbott Laboratories*, the lower court failed to fully consider the hardship to the State of Texas of denying judicial consideration of its complaint. In *Abbott Laboratories*, the Court characterized the hardship prong as asking whether "the legal issue presented is fit for judicial resolution, and

. . . requires an immediate and significant change in [Texas's] conduct of [its] affairs with serious penalties attached to noncompliance." *Id.* at 153. The lower court dismissed Texas's argument as "vague", without fully considering the difficulties Texas will encounter if it desires to impose the statutory sanctions. Pet. App. at 9a.

In Texas, as in many states, the responsibility for educating Texas school children is the joint responsibility of the State and the local school districts.[5] The Texas state legislature has set educational goals which all school districts must meet in order to ensure that all school children are provided with a comparable, quality education. In order to ensure that local school districts comply with State standards, the State must be able to hold the school districts accountable for meeting the standards. Thus, the legislature amended the Texas Education Code in 1995 to provide the option of appointing a master or management team on a temporary basis to ensure such accountability.[6]

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[5] The Texas Constitution provides that "[a] general diffusion of knowledge [is] essential to the preservation of the liberties and rights of the people" and it is "the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools." TEX. CONST., Art. VII, § 1.

[6] Chapter 39 of the Texas Education Code authorizes the imposition of sanctions on a school district in several circumstances, including: lowered or unimproved accreditation ratings where an annual review of academic performance reveals unacceptable performance by a subgroup for which data is disaggregated as to race, ethnicity, sex, or socioeconomic status under § 39.051(b); where an investigation discloses violations of federal law or regulations; or where an investigation discloses a violation of the state's accountability system, accounting and financial practices, excessive alternate placements, or violations of civil rights or (continued...)

The lower court's dismissal of the action puts the State of Texas in the untenable position of not knowing whether its important educational reforms will be deemed legal, and requiring that the State mire itself in time-consuming litigation or bureaucratic review any time it desires to exercise its authority under its education statute.[7] This quandary is particularly egregious because the reforms at issue, *viz.*, the ability to appoint a master or management team, are intended to allow Texas to act promptly, but on a temporary basis, in order to address the failure of local school districts to comply with state education standards or federal law.

The result dictated by the lower court effectively transforms the Voting Rights Act into a mandate that the federal government intervene into matters of state administration unrelated to voting. This result constitutes an enormous federal intrusion on the state's traditional autonomy in providing educational services to its citizens. This Court has already held that the Voting Rights Act does not compel such an extreme result.

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[6](...continued)
other federal requirements. TEX. EDUC. CODE §§ 39.073; 39.074; 39.075. Thus, the lower court's ruling creates the ironic result that the Voting Rights Act may be used to hamstring efforts to improve educational opportunities for racial and ethnic minorities.

[7] Indeed, in the lower court Texas cited as an example a situation in which one school district sought to preclear placement of a management team on March 10, 1996. Sixty days later, DoJ sought additional information, and DoJ finally precleared the placement on June 6, 1996, on an "expedited" basis. In the interim, both the Internal Revenue Service and the Federal Bureau of Investigation had raided the district's offices to investigate financial wrongdoing. Texas Mot. for S.J. at 23, n. 13 (Sept. 19, 1996).

In *Presley v. Etowah County Commissioners*, 502 U.S. 491 (1992), this Court stated:

> By requiring preclearance of changes with respect to voting, Congress did not mean to subject routine matters of governance to federal supervision. Were the rule otherwise, neither state nor local governments could exercise power in a responsible manner within a federal system.
>
> * * *
>
> If federalism is to operate as a practical system of governance and not a mere poetic ideal, the States must be allowed both predictability and efficiency in structuring their governments. Constant minor adjustments in the allocation of power among state and local officials serve this elemental purpose.
>
> Covered changes must bear a direct relation to voting itself.

Id. at 507-510.

Moreover, it cannot be said that Texas's hardship is remedied by the opportunity to conduct "expedited" litigation in the future. The power of the federal government to force Texas to seek approval for its every use of the master or management team appointment power violates principles of federalism and weakens Texas's ability to ensure quality education. In *Allen*, while addressing the need for a three-judge panel to hear Section 5 disputes, the Court stated, "The clash [created by the Voting Rights Act] between federal and state power and the potential disruption

to state government are apparent. . . . Other provisions of the Act indicate that Congress was well aware of the extraordinary effect the Act might have on federal-state relationships and the orderly operation of state government." *Allen*, 393 U.S. at 562-63.

States cannot efficiently conduct the vital function of educating school children when any attempt at enforcing accountability must be first approved by the federal government or a court. Texas framed for the lower court a pure legal issue arguing that it did not require preclearance in order to implement its reforms. The lower court could have and should have adjudicated that claim.

II. THE APPOINTMENT OF A MASTER OR MANAGEMENT TEAM PURSUANT TO TEX. EDUC. CODE § 39.131(a)(7),(8) WOULD NOT CONSTITUTE A CHANGE IMPLICATING SECTION 5 OF THE FEDERAL VOTING RIGHTS ACT

Essential to DoJ's argument, and the lower court's decision, is the presumption that the appointment of a master or management team under Texas law might constitute a change affecting voting rights within the meaning of the Voting Rights Act. Under that argument, because such an appointment may or may not constitute such a change, the lower court held that it could not rule on Texas's declaratory judgment action in the absence of a fact-specific exercise of the appointment authority. However, the presumption that such an appointment might implicate the Voting Rights Act is erroneous, and therefore the district court should have ruled on Texas's complaint because it presented a pure question of law.

The Voting Rights Act was intended to "implement[] Congress' firm intention to rid the country of racial discrimination in voting." *Allen*, 393 U.S. at 548. Under the Act, any covered state must obtain preclearance of legislation that is a "voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 . . . ." 42 U.S.C. § 1973c. The Act further provides that "voting" shall include "all action necessary to make a vote effective in any . . . election, including, but not limited to, registration, listing pursuant to this Act, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast . . . ." 42 U.S.C. § 1973*l*(c)(1).

Section 5 of the Act was designed to address the concern that States would enact new and slightly different voting requirements for citizens after the Act suspended various practices, such as literacy requirements and other voting qualifications. *Allen*, 393 U.S. at 548. Thus, in that case, the Court held that Section 5 applied to state rules relating to qualifications of candidates and to state decisions as to which officers shall be elective. *Id.* at 564-65. However, in recognition of the countervailing interests of the states, the Act is clear that states need not seek preclearance if the legislation in question does not affect voting. As this Court stated in *Presley*, " . . . § 5 is unambiguous with respect to the question whether it covers changes other than changes in rules governing voting: It does not." *Presley*, 502 U.S. 509.

In this respect, DoJ and the lower court ignored this Court's seminal decision in *Presley*. The issue presented in

that case was whether the permanent delegation of authority from an elected to an appointed official constituted a change respecting voting. In that case, a group of County Commissioners, without preclearance, passed a resolution altering a prior practice by which each elected county commissioner had full authority to determine how to spend funds allocated to his or her road district. *Id.* at 495-99. The commissioners passed the resolution shortly after a black commissioner was elected from a district established under a consent decree.

This Court held that: "[c]hanges which affect only the distribution of power among officials are not subject to § 5 because such changes have no direct relation to, or impact on, voting." *Id.* at 506. The Court explained, "[o]ur cases since *Allen* reveal a consistent requirement that changes subject to § 5 pertain only to voting." *Id.* at 502. The Court described the limited areas in which it had found the Voting Rights Act to apply, which included: changes in the manner of voting; changes in candidacy requirements and qualifications; changes in the composition of the electorate that may vote for candidates for a given office; and the creation or abolition of an elective office. *Id.* at 502-03.

Notably, the Court in *Presley* rejected the contention of a prior administration's Department of Justice, embodied in an administrative construction of Section 5 of the Act, that the Voting Rights Act applied. *Id.* at 508-09. The change in the authority of elected officials did not constitute a change affecting voting because there had been no change in elective office, and it was "a routine part of governmental administration for appointive positions to be created or eliminated and for their powers to be altered." *Id.* at 507.

Explaining in terms directly applicable to the United States' argument in this case, the Court stated:

> A citizen casting a ballot for a commissioner today votes for an individual with less authority than before the resolution, and so, it is said, the value of the vote has been diminished.
>
> Were we to accept appellants' proffered reading of § 5, we would work an unconstrained expansion of its coverage. Innumerable state and local enactments having nothing to do with voting affect the power of elected officials. When a state or local body adopts a new governmental program or modifies an existing one it will often be the case that it changes the powers of elected officials. So too, when a state or local body alters its internal operating procedures . . . it "implicate[s] an elected official's *decisionmaking authority*." (Citation omitted; emphasis in original.)
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> * * *
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> Under the view advanced by appellants and the United States, every time a state legislature acts to diminish or increase the power of local officials, preclearance would be required. . . . The all but limitless minor changes in the allocation of power among officials and the constant adjustments required for the efficient governance of every covered State illustrate the necessity for us to formulate workable rules to confine the coverage of § 5 to its legitimate sphere: voting.

Id. at 504-06.

As was the case in *Presley*, the voters of Texas will still elect members of the school districts' boards of trustees, and the boards will continue to exist and retain their powers. This case thus presents an even less compelling case than *Presley* for a finding that preclearance is required: in *Presley*, authority was *permanently* delegated from an elected to an appointed official; in this instance, if the Texas Commissioner of Education appoints a master or management team, the appointed entity's authority is strictly limited by the statute and is also limited in time to the duration of the deficiencies which gave rise to the appointment.

The Court's decisions in *McCain v. Lybrand*, 465 U.S. 236 (1984), and *Lockhart v. United States*, 460 U.S. 125 (1983), both of which predate *Presley*, do not dictate a contrary result.[8] In *McCain*, the Court addressed a complaint filed by black voters concerning a change whereby appointed officials were replaced by elected officials. The Court's ruling focused on whether the Attorney General's lack of objection to a later amendment effectively ratified a prior change in the relevant statute; the Court held that it did not. *McCain*, 465 U.S. at 257-58. The Court did not need to reach the question whether the changes required preclearance under Section 5, because the parties had entered a stipulation agreeing that Section 5

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[8] The Court's decision in *Bunton v. Patterson*, 393 U.S. 544 (1967), is also distinguishable from this case. As this Court described the case in *Presley*, *Bunton* did not involve a change in relative authority of government officials, but rather a permanent change from an elective office to an appointive one. *Presley*, 502 U.S. at 505-07; *Bunton*, 393 U.S. at 550-51. After the change, citizens were prohibited from electing an officer formerly subject to the approval of the voters.

applied, apparently because the change resulted in an at-large residency requirement voting scheme. *Id.* at 250, n. 17. An additional question concerning yet a third change arguably implicating Section 5 was likewise not addressed by the Court. *Id.* at 258, n. 30.

In *City of Lockhart*, the Court held that a City's new election plan did not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group, and the Court reversed a district court finding to the contrary. *City of Lockhart*, 460 U.S. at 136. In reaching this result, the Court stated that the City's extensive new election plan for the election of city officials was subject to preclearance under Section 5. Again, in acknowledgment of the fact that the election plan created significant change in the manner of election of city officials, the City conceded that Section 5 applied to its electoral changes, the addition of two seats to the governing body, and the introduction of staggered terms of office. *Id.* at 131. However, the City contended that several other aspects of its procedures were severable and were not covered by Section 5. The Court held that the City's entire plan was subject to preclearance because individual elements of the plan could not be viewed in isolation, but could only be evaluated in the context of the other elements of the election plan which the City had acknowledged as covered by Section 5. *Id.* at 131-32.

Thus, neither case supports the argument that Texas's power to temporarily appoint a master or management team for a school district requires Section 5 preclearance. To the contrary, *Presley* makes clear that Texas's education reforms do not constitute changes in voting within the meaning of Section 5.

III. TEXAS'S CLAIM THAT THE VOTING RIGHTS ACT DOES NOT APPLY TO STATUTES AUTHORIZED BY FEDERAL LAW IS RIPE FOR REVIEW

In the lower court, Texas argued that its educational reforms were, for purposes of analysis under the Voting Rights Act, authorized or even mandated by federal law. Texas contended that federal law, including the federal Improving America's Schools Act, 20 U.S.C. § 6301, *et seq.*, and the Goals 2000: Educating America Act ("Goals 2000"), 20 U.S.C. § 5801, *et seq.*, authorized Texas to use its own education accountability program and to take action against substandard school districts.

For example, Texas argued that the Improving America's Schools Act required it to take action against local educational agencies that fail to make adequate progress toward meeting student performance standards, and those actions included the appointment of a receiver or trustee to administer the affairs of the local educational agency in place of the superintendent and school board. 20 U.S.C. § 6317(d)(6)(B)(i)(IV). Texas argued that its reforms were therefore tantamount to acts taken pursuant to federal law, which did not require preclearance under the Voting Rights Act because that Act applies only to affected states and subdivisions.[9]

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[9] Section 1973 of the Voting Rights Act provides, in pertinent part:

> [n]o voting qualification or prerequisite to voting or standard, (continued...)

Texas's claim presents a pure legal issue which was certainly ripe for review. No factual development or case-specific application of the appointment power was necessary for the lower court to resolve this issue. Simply stated, Texas's claim asked the court to resolve whether reforms it had enacted pursuant to federal education statutes were within the ambit of the Voting Rights Act, or whether, as a matter of law, they were exempt from Voting Rights Act scrutiny. The answer to that question could not possibly depend on the precise amount of authority granted the master or management team, the duration of the appointment, or the specific actions taken by the appointed entities. Regardless of those variables, Texas presented a question of law contending that the reforms would not be covered by the Voting Rights Act in all cases.

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[9](...continued)

> practice, or procedure shall be *imposed or applied by any State or political subdivision* in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . .

42 U.S.C. § 1973 (emphasis added).

CONCLUSION

Amici curiae respectfully urge that the judgment of the U.S. District Court for the District of Columbia be reversed.

Respectfully submitted,

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